IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1976

No.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 13,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MARTHA GOLDIN
Attorney at Law
1407 North La Brea Avenue
Hollywood, California 90028
(213) 851-7200

GEORGE E. SHIBLEY, ESQ.
Heartwell Building, Suite 505
Long Beach, California 90802
(213) 437-2295

Attorneys for Petitioner

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 15, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals, reproduced as Appendix "A" hereto, enforcing an order of the NLRB in consolidated cases, is reported at 549 F.2d 1346 (9th Cir. 1977). The order of the NLRB, reproduced as Appendix "B" hereto, enforced by the court below is reported at

210 NLRB 952. The decision and order of the Board in the earlier of the consolidated cases here involved (the Gatlin case), is reported at 183 NLRB 221 and reproduced as Appendix "C" hereto. The order of the court below remanding the Board's decision in Gatlin is reported at 80 LRRM 3213 and reproduced as Appendix "D" hereto. The decision and order of the Board in the later of the consolidated cases here involved (the PMA case) is reported at 192 NLRB 260 and reproduced as Appendix "E" hereto.

JURISDICTION

The judgment of the Court of Appeals, reproduced as Appendix "A" hereto, was entered on March 15, 1977. A timely Petition for Rehearing was denied on May 20, 1977. A copy of the order denying rehearing is reproduced as Appendix "F" hereto. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

The consolidated cases involve a complex system whereby longshoremen are registered for and dispatched to stevedoring jobs in the Los Angeles-Long Beach harbor area. Both registration and dispatch are accomplished jointly by Petitioner Union and Pacific Maritime Association (PMA), the collective bargaining agent for the employer stevedoring companies, although Union members staff the joint dispatch hall.

The unfair labor practices are grounded in two premises: first, that the Union utilized an impermissible

sponsorship system in selecting its proposed applicants for registration; and, second, that it discriminatorily dispatched non-registered "casuals" to longshore jobs in a manner which gave Union members referral preference.

The finding, upheld by the court below, that the Union engaged in discriminatory dispatching is based upon data which does not show that a single person was the object or victim of discrimination. The Order of the Board, approved by the Court of Appeals, that the Union "[m]ake whole. . .applicants for employment for any loss of earnings they may have suffered by reason of [the Union's] discriminatory exercise of its dispatch authority" rests upon a record in which counsel for the Board's General Counsel conceded "there is nc evidence . . .to show who was eligible for employment. . . ." (Transcript of the proceedings on remand, p. 13).

Within six months before the charges were filed there had been no occurrence which might have been an unfair labor practice. All the evidence that the Union had at one time used a sponsorship system, its nature and consequences, consists of acts and events barred by § 10(b) of the National Labor Relations Act (NLRA), 29 USC § 160(b). The Union's objections to barred events were overruled on grounds which appear to be contrary to the law as interpreted by this Court in Local Lodge No. 1424, Int'l. Assoc. of Machinists v. N.L.R.B., 362 U.S. 411 (1960).

The court below agreed with the Board that the sponsorship system was discriminatorily favorable to the

Union and that it was unlawful. It affirmed a conclusion "that the Union's sponsorship program was unlawful [and] that the Union's insistence upon that program violated its duty of fair representation. . . ." (Appendix A, pp. 11-12). Yet the record is that within (or without) the § 10(b) period not one job applicant, Union or non-Union, has ever been denied employment opportunity because of the sponsorship program. Furthermore, erroneous conclusions, derived from evidence of a supposed sponsorship practice, which evidence has long been barred by § 10(b), led the court to agree that the Union had refused to bargain in good faith concerning registration in spite of the continual meetings, discussions and negotiations between the parties, culminating in a registration based upon an amalgam of both their proposals.

The consequences of reliance upon time-barred evidence have been grave for the Union. The back pay award, alone, may amount to millions of dollars and destroy a Union already plagued with problems resulting from profound technological changes in the industry. The other "remedies" stigmatize the Union and require it to engage in onerous, needless record-keeping chores.

In the foregoing context, the questions here presented are:

1. Whether an order that the Union provide back pay to applicants for employment is in excess of the Board's jurisdiction and contrary to the NLRA § 10(c), 29 USC § 160(c), where there is no evidence that anyone was eligible for employment, there is no evidence that

anyone was denied employment, and there is no order of reinstatement.

2. Whether a decision that the Union violated the NLRA §§ 8(b)(1)(A) and (2), 29 USC §§ 158(b)(1)(A) and (2), and its duty of fair representation under §9, 29 USC § 159, predicated upon evidence of Union practices which allegedly encouraged Union membership but which were never shown to have discriminated against non-Union applicants for registration or employment is in excess of the Board's jurisdiction.

3. Whether the NLRA §8(b)(3) [29 USC §158(b)(3)] obligation to bargain in good faith imposed upon the Union the duty to acquiesce in particular demands or forego positions found by an arbitrator to be valid.

4. Whether the decision that the Union violated the NLRA, §8(b)(3), 29 USC § 158(b)(3) is contrary to §10(b) [29 USC §160(b)], without support in the record and deprives the Union of due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth Amendment, due process clause; the statutory provisions involved are the National Labor Relations Act, as amended, Sections 7 (29 USC § 157), 8(b)(1)(A) [29 USC § 158(b)(1)(A)], 8(b)(2) [29 USC § 158(b)(2)], 8(b)(3) [29 USC § 158(b)(3)], 8(d) [29 USC § 158(d)], 9(a), [29 USC § 159(a)], 10(b) [29 USC § 160(b)] and 10(c) [29 USC § 160(c)]. The pertinent provisions of the Constitution and

statutes involved are reproduced in Appendix "G" hereto.

STATEMENT OF THE CASE

A. For many years the Union has been the exclusive bargaining representative of workers performing longshore labor in the Los Angeles-Long Beach harbor area under a labor relations agreement between its parent organization, the International Longshoremen and Warehousemen's Union (the International) and PMA. PMA is the collective bargaining agent for stevedore employers on the Pacific Coast.

The agreement establishes various joint committees on which PMA and the Union have equal representation. The Joint Coast Labor Relations Committee is a PMA-International body with jurisdiction over contract grievances and some supervisory power over the Joint Port Labor Relations Committee (Joint Port Committee). The Joint Port Committee, a PMA-Union body, maintains and operates a dispatch hall (the Central Hall) from which registered longshoremen are dispatched for employment as stevedores. Warehousemen are also dispatched from the Central Hall. Although the hall is jointly operated, dispatching is done by persons elected by the Union's membership.

B. The determination that the Union operated the dispatch hall in a discriminatory manner and thereby violated the NLRA is extrapolated from statistics which show no discriminated-against longshoremen. Dispatch preference to stevedoring jobs is given first to fully

registered, i.e., Class A longshoremen, and then to limited registered, or Class B men. Available jobs not filled by registered longshoremen are dispatched to unregistered extras, i.e., "casuals." Class A registered men are usually members of the Union, whereas Class B men and casuals are generally not Union members.

Warehousemen are covered by separate labor relations agreements between the union and employers. They must accept proffered warehouse jobs or they cannot work. The practice of dispatching commercial warehousemen from the Central Hall to extra longshore work when there is insufficient warehouse work is one of longstanding. Terminal Warehousemen (TW) is a category of Union membership available to men who perform terminal warehouse work under separate agreements covering such work. They are required to fill all requests for terminal warehousemen before any of them may be dispatched to extra longshore work.

Between 1967 and 1970 the Union increased its TW membership from under 100 to approximately 635. About 80 to 85 of these were steadily employed by companies under terminal warehouse contracts. During several months in mid-1969, the number of TW's dispatched to extra longshore jobs increased, while the number of other non-registered men dispatched decreased. Whether the change was at the expense of casuals who were not TW's is not known, as there is absolutely no evidence on this question.

C. Either PMA or the Union "may demand additions or subtractions from the registered list as may be necessary to meet the needs of the industry." Class A men are selected from among the B registered men who meet certain criteria. Registration of Class A and Class B longshoremen is accomplished by the Joint Port Committee. In about June, 1967, applications for Class B registration were received, and intermittently thereafter for about two years, the Joint Port Committee discussed the selection and registration of 200-400 of the applicants. Between December, 1968 and December, 1969, the matter was deferred by mutual agreement of PMA and the Union, pending contract negotiations on "containerization" of the industry. No additions were made to the list of B registrants from the time the 1967 applications were received until after May 4, 1970.

D. The purported §8(b)(1)(A) and §8(b)(2) violations rest upon "sponsorship." Sponsorship was a method whereby a longshoreman with "A" registration could recommend an applicant for "B" registration. It had been used for many years and was continued through the 1965 registration to effectuate the requirements of the law and the contract that there be no discrimination on account of race. Thereafter, in November, 1965, the Joint Coast Committee decided that sponsorship would not be used in the future.

In 1966 the Joint Port Committee used sponsorship to screen and register a number of "B" longshoremen

previously authorized by the Joint Coast Committee. Commencing in December, 1966, the committee engaged in negotiations for further registration. When, in January, 1968, the Union rejected a list of 475 applicants submitted by PMA on the basis of criteria developed by it, the dispute went to arbitration. The arbitration, in March, 1968, inter alia ordered that 60 previously agreed-upon applicants be registered immediately and that 186 applicants whose names appeared on both the Union's and PMA's lists be processed for registration. All this occurred prior to the 10(b) period.

One of the supposed acts of sponsorship took place on October 2, 1968, (the first relevant date within the 10(b) time frame). On that date, the Union submitted to the Joint Port Committee for registration processing a list of names which it believed to be the 186 referred to above. It was not; it was a list of 254 (or 256) applicants and sponsors. At the next Joint Port Committee meeting, the Union stated the list had been submitted in error and that a new list would be provided. At the following meeting PMA again submitted its list of 475 applicants. The parties made no decision on either side's proposals. Meetings on the implementation of the March, 1968 arbitrators award continued until about November when the registration question was deferred by mutual agreement, for approximately one year.

Negotiations resumed in the latter part of 1969. The Union suggested criteria which included giving weight to longshore experience and proposed accepting

all those on PMA's list with 100 hours of stevedoring work. PMA rejected the Union's position because most of the men who had acquired the requisite experience as casuals were TW members of the Union. In April, 1970, agreement was reached on the list of 186 applicants, but not on the others. The question was arbitrated and on May 4, 1970, the arbitrator decided that both PMA and the Union had utilized appropriate criteria for selecting applicants; chose the 186 (by then reduced to 172) and an additional 60 whose names were on both the PMA and Union lists, for registration.

Another alleged act of sponsorship within the §10(b) period involves an applicant for "B" registration. In June, 1967, James Phillips, a casual, unregistered longshoreman, completed an application for "B" registration. He had no sponsor. On February 20, 1969, he asked a Union official the status of his application. He was shown his number on the list of applicants (#2074), and was told "[Y]ou don't have a sponsor so I can't very well tell you what to do about it, but there will be some applications out in the near future. . . .[G]et you a sponsor in the meantime." (Appendix A, page 8).

Phillips' only application, without a sponsor's name, was made prior to the 10(b) period. No other application ever became available and he submitted no new application, nor did he get a sponsor. There is nothing in the record to indicate that Phillips was eligible for selection as a "B" registrant, that his name was on PMA's list and rejected by the Union, or that the

Union refused to submit his name in due course according to valid standards and his place on the list.

E. In the Gatlin case, the earlier of the consolidated cases, the Board found "sponsorship" and therefore violations of §§ 8(b)(1)(A) and (2) based upon the Phillips' application and the repudiated October 2, 1968 list of applicants and sponsors. On that record, the Court of Appeals was unable to understand how sponsorship actually worked and its effect, and remanded the case.

In the PMA case, the Board found violations of §§ 8(b)(1)(A) and (2) based upon the purportedly discriminatory dispatch by the Union of TW's to extra jobs, and of § 8(b)(3) because of the Union's position in negotiations on registration that work-experience be considered.

After consolidation of the cases, the Board rendered a decision which essentially combined the results in the separate cases. It ordered the Union to cease and desist from further use of the sponsorship system, from discriminating in favor of Union members in dispatching longshoremen, and from refusing to bargain in good faith. It ordered the Union to pay all applicants for lost wages resulting from its discrimination and to maintain permanent records of all referrals.

F. The Court of Appeals affirmed the Board in all respects. It held the "back pay" award proper without proof that any person had been discriminated against. Whereas the Act permits an order of reinstatement with

or without back pay, the court enforced an order of back pay without reinstatement.

The court brushed aside the Union's contention that sponsorship was a dead issue, long barred by §10(b) of the Act. The opinion simply "revived" old acts and practices, dubbing them interpretive evidence, despite the fact there were no timely acts to construe.

Although there was not the slightest evidence that the Union ever favored any of its members over non-Union job seekers, the court affirmed the Board's findings of discriminatory preference. In the face of a history of continual bargaining, with proposals and counter-proposals throughout, and an ultimate outcome consistent with the Union's position, the court below held that the Union had violated § 8(b)(3). It ordered enforcement of the Board's entire order.

REASONS FOR GRANTING THE WRIT

1. The Back Pay Order Is Not Authorized By the Act. An Order For Back Pay On Account of Losses Suffered Because of the Union's Allegedly Preferential Dispatch Procedures Is Contrary To § 10(c) of the Act In the Absence of Evidence That There Were Applicants Ready, Willing and Able To Take Job Referrals Who Were Refused Dispatch.

The Board found, and the court below agreed, that the Union violated §§ 8(b)(1)(A) and (2) of the Act by giving dispatch preference for casual employment to its TW members. Basing its decision on a statistical compilation which showed an increase in the number of

TWs dispatched and a decrease in the number of other non-registered men dispatched as casuals, the Board concluded that the Union was discriminating in favor of the TWs and therefore against non-Union applicants. The Board deemed it irrelevant that not one non-Union, non-TW applicant ever claimed to have been denied referral; not one ever claimed to have presented himself for dispatch and been turned away in favor of a TW or any other Union applicant. In reliance upon its statistically-derived finding and without proof of loss by so much as one individual, the Board made its backpay order.

There is no precedent for the order. Since this Court's decision in Local 357, International Brotherhood of Teamsters, etc. v. N.L.R.B., 365 U.S. 667, 81 S.Ct. 835 (1961), in which it held that an agreement requiring an employer to obtain casual labor through a union hiring hall is not per se a violation of the Act, litigation has abounded. Its focus has been on discriminatory operation of such hiring halls. Not once has a finding of discrimination been made in the absence of evidence that at least one person was deprived of his rightful job opportunity. Not once has a back pay order been made on behalf of a statistically created class which has no representative victim of the supposed discrimination. See, e.g., N.L.R.B. v. Local 542, 542-A & 542-B, Int'l. U. of Operating Engineers, 485 F.2d 387 (3d Cir. 1973); Pacific Maritime Association v. N.L.R.B., 452 F.2d 8 (9th Cir. 1971); N.L.R.B. v. International Longshoremen's & Ware. U., Local 12, 378 F.2d 125 (9th Cir. 1967); N.L.R.B.

v. Local 138, Int'l. U. of Operating Engrs., 293 F.2d 187 (2d Cir. 1961); NLRB v. Local 138, Int'l. U. of Operating Engrs., 321 F.2d 130 (2d Cir. 1963); NLRB v. Local 138, Int'l. U. of Operating Engrs., 380 F.2d 244 (2d Cir. 1967).

The back pay order, running to an entire class, none of whom have been before the fact finder, violates concepts of due process. Proof of actual discrimination must be made at the administrative level. Hence, proof of actual entitlement to a back pay award must be made at the administrative level. Else, at the compliance stage each statistically ascertained "discriminatee" may present himself, and without ever showing that his decline in employment had been caused by unlawful Union preference give to others, merely establish the amount of his loss. Back pay would be awarded without the issue of actual discrimination having been litigated at any point in the proceedings.

This Court has held that the Board may not order reimbursement in the absence of proof that the funds would not have been paid but for the unfair labor practice. Local 60, United Brotherhood of Carpenters, etc., AFL-CIO v. N.L.R.B., 365 U.S. 651, 81 S.Ct. 875 (1961). The blanket order in this case is, with respect to back pay, precisely the type of order the Court invalidated in Local 60. If an order of reimbursement without a showing that "but for" the unfair practice the payments would not have been made is beyond the scope of affirmative orders permitted by § 10(c), can it be otherwise with a back pay order? It would appear not.

NLRB v. Local 2, United Assn. of Journey & Apprentices, P. & P.I., 380 F.2d 428 (2d Cir. 1966).

> Where no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice, no "consequences of violation are removed by the order [of reimbursement]. . . . The order in those circumstances becomes punitive."

Local 60, United Brotherhood of Carpenters, etc., AFL-CIO v. N.L.R.B., supra, 365 U.S. at 655.

The Board may not make an order which is punitive rather than remedial. Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 61 S.Ct. 77 (1940). Therefore, it may not "apply a remedy it has worked out on the basis of experience, without regard to circumstances which may make its application to a particular situation oppressive. . . ." N.L.R.B. v. Seven-Up Bottling Co., Inc., 344 U.S. 344, 349, 73 S.Ct. 287 (1953).

The language of the Act is explicit. It says, with respect to back pay, § 10(c) [29 U.S.C. § 160(c)]:

> [T]he Board shall. . .order. . .reinstatement of employees with or without back pay. . . Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

Only the quoted language authorizes back pay. While affirmative remedies are within the jurisdiction of the Board, they are encompassed by the more general language of § 10(c), which provides:

> [T]he Board shall. . .order. . .such affirmative action. . .as will effectuate the policies of this subchapter. . . .

No where is "back pay" not linked with "reinstatement."

In the case at bar, there was no order of reinstatement, nor could there be one. The dispatcher was empowered only to refer casuals to jobs. The employer did the hiring. Dispatch was not the equivalent of hire, hence no employment was created by dispatch. That being the case, no right of reinstatement could arise by virtue of a failure to dispatch. Therefore, no back pay award was authorized by § 10(c).

The propriety of the back pay award is also open to question because of the Colonial Hardwood Doctrine. In United Furniture Workers of America, CIO (Colonial Hardwood, 84 NLRB 563 (1949), the Board, albeit referring solely to § 8(b)(1)(A) violations, distinguished between those cases in which an employee is denied access to a plant and those cases in which the union causes a termination or disruption in a worker's employment status. Where, as here, no employment relation is created by dispatch, it does not appear that failure to dispatch can cause an end to the employment status. It follows that back pay is not the proper remedy.

It would seem, from the language of § 10(c) that back pay is an available remedy only where employment as a matter of right is ended or disrupted by an unfair labor practice, e.g., where "but for" the wrongful conduct the

applicant would have had the job; "but for" the wrongful conduct the employee would have retained the job. In such cases, "reinstatement of employees with or without back pay" is appropriate. But in a case such as the instant one, in which dispatch is not the equivalent of hire, failure to dispatch is not the equivalent of refusal to hire or termination of employment; the right of reinstatement does not exist; and back pay is unauthorized.

2. Unfair Labor Charges Involving a Requirement of Sponsorship for Applicants for Registration Do Not Allege Continuing Violations. The Purported Violations Based On Sponsorship Are Barred By § 10(b) [29 USC § 160(b)].

The court below, in effect, held that charges that the Union imposed a requirement of sponsorship by Class A longshoremen on applicants for B registration were allegations of continuing violations. Citing Int'l Union, United Auto, Aerospace & Agri. Imp. Workers v. NLRB, 363 F.2d 702 (D.C. Cir. 1966), a continuing violation, refusal to bargain case, the court rejected the Union's contention that the charges were time barred as § 10(b) has been construed in Local Lodge #1424, Int'l. Assoc. of Machinists v. NLRB, 362 U.S. 411, 80 S.Ct. 822 (1960).

Whether or not the concept of a continuing violation is generally applicable to charges under the Act has produced certain conflicts among the circuits. Notably, with respect to charges of refusal to sign a contract, there is a lack of unanimity of rationale and result.

Thus, the Ninth Circuit holds that it is a continuing violation, with each refusal in and of itself as a substantive matter, an unfair labor practice. NLRB v. Strong, 386 F.2d 929, 931 (9th Cir. 1961). The First Circuit has expressly rejected Strong, and, distinguishing between the general (and presumably, continuing) failure to bargain and a specific failure to do a particular act, has placed a refusal to sign a contract in the latter category, making the event finite in time. NLRB v. Fields & Sons, 462 F.2d 748 (1st Cir. 1972). The Sixth Circuit, while agreeing with the First Circuit that a refusal to sign a contract is not a continuing violation, has adopted a different reason. NLRB v. McCready & Sons, Inc., 482 F.2d 872 (6th Cir. 1972). The circuit has looked to the purpose of the six months limitation period and has decided that it exists, inter alia, to pinpoint the time and nature of defenses. Since a refusal to sign is a precise event at which moment there may be particularized defenses, the extension of the notion of continuing violation to such an unfair labor practice would, in the words of the McCready court, "contravene the purpose of Section 10(b)." (482 F.2d at 875).

The unfair labor practice complained of here was the requirement that applications be sponsored. The only applications involved had been accepted by the Union about two years prior to the earliest complaint. The court below looked to two subsequent occurrences to continue or revive what the Union urged was a defunct

practice: the conversation about sponsorship, with charging party Phillips; and, the submission of a supposedly sponsored list of applicants (almost immediately thereafter withdrawn). Neither of these events could, as a substantive matter, constitute unfair labor practices. Only if, as the court below intimated, the acceptance of sponsored applications long prior to the § 10(b) period was a continuing violation, could those later occurrences amount to timely charges. It appears to the Union that this court precluded such a conclusion by the Local Lodge #1424 decision. In light of the differing views on the continuing nature of purported violations and varying interpretations of the Local Lodge #1424 decision, the question requires re-examination and clarification by this Court.

3. The Decision Below Raises Significant Questions Regarding the Interpretation of the National Labor Relations Act.

(a). Does the duty of fair representation extend to those who are not members of the bargaining unit? The court below held that the sponsorship requirement breached the Union's duty of fair representation under § 9 [29 USC § 159] of the Act. The sponsorship requirement, if indeed there was one within the § 10(b) period, applied to applicants for Union recommendation for registration consideration by the Joint Port Committee. Both Union and PMA could make recommendations to that body; both made final selections, jointly. Is a Union

bound by § 9 to refer from among non-bargaining unit applicants on the basis of unsponsored neutrality? The note by this Court in Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 181, n.20, 92 S.Ct. 383 (1971), to the effect that the Union has no duty "affirmatively to represent nonbargaining unit members or to take into account their interests. . . ." intimates a negative answer. The court below decided in the affirmative.

(b). Is the decision below contrary to Radio Officers Union of Commercial Telegraphers, AFL v. NLRB, 347 U.S. 17, 74 S.Ct. 323 (1954)? The Court of Appeals held that the Union's supposed sponsorship requirement violated §§ 8(b)(1)(A) and 8(b)(2) [29 USC §§ 158(b)(1)(A) and 8(b)(2)] of the Act. Section 8(b)(2) prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of § 8(a)(3). That is, it is a violation if a union (1) causes or attempts to cause employer discrimination which (2) encourages or discourages membership in a labor organization. Not all discrimination, according to the Radio Officers case is a violation of the Act; only that which has the impermissible impact.

In the case at bar, not one applicant was refused an application for registration; not one was denied placement on the list; not one was rejected for employment because of lack of a sponsor; [1/] not one was required to

1/ The Administrative Law Judge in the PMA case expressly refused to find that the charging party, Phillips, had been prevented from being assigned to his share of longshore work, and refused to order the Union to make Phillips whole. See Appendix E, p. 11, n. 23.

join the Union. Furthermore, not one Union member was required to or did remain in the Union because of sponsorship. Can an assumed "discrimination," with neither a discriminatee nor a coerced Union member be an unfair labor practice? The Radio Officers case compels an answer in the negative; the court below answered in the affirmative.

(c). May a violation of the Union's duty to bargain be predicated upon its bargaining demands which, after the fact, the Board deems capricious? The answer would appear to be "no" in light of the proviso in § 8(d) [29 USC § 158(d)] that the obligation of the parties to meet and confer "does not compel either party to agree to a proposal or require the making of a concession." See, NLRB v. American Nat'l. Ins. Co., 343 U.S. 395, 72 S.Ct. 824 (1952). Yet, the Board, as affirmed by the court below, viewed a history of dozens of meetings, proposals and counterproposals, all dealing with registration of Class B longshoremen, and all culminating in a mutually agreeable registration, as a violation by the Union of § 8(b)(3). The decision appears to be in conflict with the Fifth Circuit decision in NLRB v. American Aggregate Co., 335 F.2d 253 (5th Cir. 1964). In that case the court dismissed a civil contempt order for a purported refusal to bargain as previously directed by the Board. The court there rejected the Board's contention that:

> [T]hough the respondent was not obligated to agree on any particular matter at issue between

> it and the board, it can be compelled so to agree by the device of making the right of management to insist upon its own decision of disputed issues depend upon whether [its] decision. . . . appears to the board to be capricious or not well advised.

(335 F.2d at 254). See also, NLRB v. Alva Allen Industries, Inc., 369 F.2d 310 (8th Cir. 1966); NLRB v. Wonder State Manufacturing Co., 344 F.2d 210 (8th Cir. 1965); NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964). The decision below allows the Board to dictate terms and conditions by finding that the parties lack of agreement was over improper demands. It should be reviewed to determine whether the Act permits the Board to make such a decision in light of the caveat at § 8(d).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARTHA GOLDIN and
GEORGE E. SHIBLEY

By MARTHA GOLDIN
Attorneys for Petitioner